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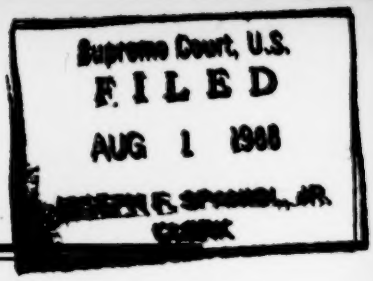

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ITHACA INDUSTRIES, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the religious accommodation requirement of Title VII of the Civil Rights Act of 1964 requires an employer to discriminate against some employees in order to enable others to observe their Sabbath?

2. Whether religious accommodation efforts by an employer can be systematic and apply to all employees, or must those efforts be specifically aimed at accommodating an individual employee's religious beliefs?

3. Whether a district court's finding of religious discrimination vel non under Title VII of the Civil Rights Act of 1964 can be reversed by a court of appeals absent clear error?

4. Whether the religious accommodation requirement of Title VII of the Civil Rights Act of 1964 violates the Establishment Clause of the First Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. The Court of Appeals Has Decided Three Federal Questions In A Way Which Conflicts With Applicable Decisions Of This Court	7
A. Reasonable Accommodation Does Not Include A Mandated Religious Preference (Question 1)	7
B. Systematic Accommodation May Be Reasonable (Question 2)	8
C. Religious Discrimination Vel Non Is A Finding Of Fact For The District Court's Initial Determination (Question 3)	9
II. The Constitutionality Of Title VII's Religious Accommodation Requirement Was Sustained By The Court Of Appeals. This Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court (Question 4)	10
CONCLUSION	12

TABLE OF CONTENTS—Continued

Page

APPENDICES

A. En Banc Opinion Of The United States Court Of Appeals For The Fourth Circuit, Dated June 8, 1988 ..... 1a

B. Judgment Of The United States Court Of Appeals For The Fourth Circuit, Dated June 8, 1988 ..... 14a

C. Panel Opinion Of The United States Court Of Appeals For The Fourth Circuit, Dated September 24, 1987 ..... 15a

D. Memorandum Of Decision Of The United States District Court For The Western District Of North Carolina, Charlotte Division, Dated December 3, 1986 ..... 26a

E. Judgment Of The United States District Court For The Western District Of North Carolina, Charlotte Division, Dated December 3, 1986..... 37a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985) 9
Committee For Public Education v. Nyquist, 413 U.S. 756 (1973) 8
Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) 11
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 11
Isaac v. Butler's Shoe Corp., 511 F. Supp. 108 (N.D. Ga. 1980) 10
Jordan v. North Carolina National Bank, 565 F.2d 72 (4th Cir. 1977) 9
Lemon v. Kurtzman, 403 U.S. 602 (1971) 10
Protos v. Volkswagon of America, Inc., 797 F.2d 129 (3rd Cir. 1986) 10
Pullman-Standard v. Swint, 456 U.S. 273 (1982) .. 9
TransWorld Airlines v. Hardison, 432 U.S. 63 (1977) ..... *passim*
United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 7
United States Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983) 9

CONSTITUTIONAL AND STATUTORY AUTHORITIES

Civil Rights Act of 1964, Title VII, 42 U.S.C. Section 2000e, et seq. ..... *passim*
United States Constitution, First Amendment ..... *passim*

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No.

ITHACA INDUSTRIES, INC.,
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner Ithaca Industries, Inc. ("Ithaca")[1] respectfully prays that a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals For the Fourth Circuit, entered in the above-entitled proceeding on June 8, 1988.

OPINIONS BELOW

The en banc Opinion of the Court of Appeals For the Fourth Circuit (A. 1a)[2] is reported at 849 F.2d 116. The Judgment appears in the Appendix at 14a.

The panel opinion of the Court of Appeals For the Fourth Circuit (A. 15a) is reported at 829 F.2d 519.

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[1] Pursuant to Rule 28.1, Ithaca declares that it has no parent companies or subsidiaries which are not wholly owned.

[2] References to "A. ——" are to the Appendix to this petition.

The Memorandum of Decision of the United States District Court for the Western District of North Carolina, Charlotte Division (A. 26a), is reported at 44 BNA FEP Cases 1572. The Judgment appears in the Appendix at 37a.

JURISDICTION

The Court of Appeals issued its Opinion and Judgment on June 8, 1988. This Petition is filed within 90 days of that date. 28 U.S.C. Section 2101(c). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. Section 2000e(j), provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . religion . . . .

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000e-5(f)(3), 28 U.S.C. Section 1331, 28 U.S.C. Section 1343, and other statutes.

Dannel J. Dean was hired as a production employee at Ithaca's Gastonia, North Carolina plant on July 23, 1979. The Gastonia plant manufacturers finished cloth for Ithaca's twelve other plants, and is, therefore, a "feeder plant" or "hub plant" of an integrated production process. If the Gastonia plant did not produce sufficient finished cloth, Ithaca's other plants would be affected and one or more of them would have to shut down.

In 1984, due to increased demand, the Gastonia plant had to operate on some Sundays. Ithaca adopted a system for filling Sunday work requirements which was both fair and reasonable. The system was a progressive system because it first involved volunteers and later involved direct assignments. The District Court described Ithaca's system as follows:

> Not everyone on the daily work crew was asked to work when Sunday work was required because the supervisory personnel wished to allow as many employees off on Sunday as possible. Thus, [Supervisor] Cain would attempt to obtain as many volunteers as he could for the job skills needed for the Sunday shift.
>
> If Cain was unable to obtain a sufficient number of volunteers for the specific jobs which needed to be filled on a particular Sunday, he would instruct certain employees to work on Sunday.
>
> Before directing any employees to work on a Sunday, Cain would consider whether the employee had worked on a previous Sunday, or Sundays, how many hours, he had worked during the week, and

> whether the employee could do the particular job which was required. *This was out of accommodation to all employees including Dean.*
>
> (A.28a-29a) (emphasis supplied)

It is obvious from the foregoing that when employee X was "instructed" to work on a Sunday, it was because there were not enough volunteers; and it was because it was employee X's turn to work taking into account previous Sundays worked, hours worked during the week and the job requirements. If employee X did not work, then another employee (who deserved to be off) had to be "instructed" to work.

Mr. Dean was asked to work on Sunday, January 22, 1984. Mr. Dean declined, saying he expected out-of-town guests. He was not compelled to work and he was not disciplined.

Mr. Dean was asked to work on Sunday, February 19, 1984. Mr. Dean refused, saying he had other plans. He was not compelled to work and he was not disciplined.

Mr. Dean did not work on Friday, March 16, 1984, and he was given a written warning for poor attendance. Mr. Dean was then asked to work on Sunday, March 18, 1984. He refused saying he was not going to work on Sunday for anybody and that it was against his religion. Mr. Dean did not report for work on Sunday, March 18, 1984.

On Monday, March 19, 1984, Mr. Dean returned to work and was given the third written warning in his career which read in pertinent part:

> Employee has 9 absences and 1 unexcused absence. Another unexcused absence will result in termination.
>
> (A. 30a).

Mr. Dean was asked to work on Sunday, April 1, 1984, and he again refused. On Monday, April 2, 1984, Mr. Dean's employment with Ithaca was terminated.

When Mr. Dean did not report for work on Sunday, April 1, 1984, it was necessary for his supervisor to assume Mr. Dean's duties. This took the Supervisor away from his primary duty and reduced production. (A. 31a). The supervisors had several complaints from other employees about Mr. Dean's refusal to work on Sunday. (A. 32a).

This action was filed by the Equal Employment Opportunity Commission ("EEOC") on December 16, 1985, alleging a violation by Ithaca of Title VII's religious accommodation provisions. A bench trial was held in Charlotte, North Carolina, on November 18 and 19, 1986. On December 3, 1986, the District Court dismissed the case.

The District Court found as a fact that:

> Dean did not know of any of Defendant's employees who received better treatment than he did with regard to Sunday work.
>
> (A. 31a).

The District Court noted in its conclusions of law that:

> Dean and Plaintiff are asking that Defendant discriminate against all employees of the Defendant in favor of Dean so that he alone would not be required to work on Sunday.
>
> (A. 35a).

The District Court then concluded that such discrimination in favor of an employee seeking religious accommodation was prohibited under the principles set forth in *TransWorld Airlines v. Hardison*, 432 U.S. 63 (1977):

> Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and

> such discrimination is proscribed when it is directed against majorities as well as minorities. *Trans-World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977).
>
> (A. 35a).

On September 24, 1987, a panel of the Fourth Circuit affirmed the District Court (A. 15a). The panel majority opinion, like the decision of the District Court, relied in part upon the language in *Hardison* which prohibits preferential treatment based upon religion. (A. 22a). The panel majority was comprised of Circuit Judge Wilkins and District Judge G. Ross Anderson, sitting by designation. A dissent was filed by Circuit Judge Hall.

A rehearing en banc was granted and, in an opinion authored by Judge Hall, the District Court's judgment was reversed. (A. 1a). Judge Wilkins, Widener and Chapman dissented.

The en banc majority held in pertinent part:

> We disagree with the district court and find no merit in Ithaca's constitutional argument.
> (A. 4a).

The en banc majority decision did not specifically set aside any findings of fact by the District Court. The opinion did, however, appear to impose a new requirement under Title VII that accommodation efforts must be specifically tailored to an individual employee. In other words, systematic practices which applied to all employees could not satisfy the Act. Specifically, the en banc majority held:

> It is true that in this case Ithaca did demonstrate an effort to accommodate *all* their employees when Sunday work was assigned. These accommodations, however, were clearly not for reasons of religion, nor were they specifically aimed at addressing Dean's beliefs.
>
> (A. 6a) (emphasis in original) (footnote omitted).

Finally, the en banc majority held that Title VII's religious accommodation requirement did not violate the First Amendment because it had a secular purpose, a primarily secular effect and there was no excessive government entanglement with religion. (A. 7a).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED THREE FEDERAL QUESTIONS IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A. Reasonable Accommodation Does Not Include A Mandated Religious Preference (Question 1)

This Court held in *TransWorld Airlines v. Hardison*, 432 U.S. 63, 85 (1977), that Title VII will not be construed "to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." The District Court and the panel majority relied upon this holding in finding no violation of the Act. The en banc majority reversed.

Ithaca submits that granting preferential treatment to one who seeks religious accommodation, to the detriment of those who do not, runs counter to the fundamental principles of our Federal labor laws as well as the Constitution. This Court has in the recent past wrestled with difficult issues in the affirmative action area, permitting certain accommodations based on race or sex in view of historical circumstances. *E.g., United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). It is a far different matter, however, to permit a statutory preference regarding work on a particular day for a devout church goer as contrasted with, for example, a dedicated family person. There can be no constitutional purpose which would justify the discrimination resulting from the latter example. Surely this is not what Thomas Jefferson had in mind when he authored Virginia's Bill For

Establishing Religious Freedom, the precursor of our First Amendment. *Committee For Public Education v. Nyquist*, 413 U.S. 756, 770 n.28 (1973).

If the en banc majority decision is allowed to stand, it will constitute a judicially mandated religious preference for persons such as Mr. Dean. This is because the system employed by Ithaca to meet Sunday work requirements first sought volunteers and then involved involuntary assignments based upon previous Sundays worked, hours already worked during the week and the needs of the job. If the law allows Mr. Dean to refuse with impunity Sunday work assignments made under Ithaca's system, then some other employee will have to work when that employee has the right to be off and wants to be off. This is a clear religious preference prohibited by *Hardison.*

Ithaca urges this Court to accept its petition and reaffirm in unequivocal terms that reasonable accommodation under Title VII does not include a mandated religious preference.

B. Systematic Accommodation May Be Reasonable (Question 2)

This Court impliedly held in *TransWorld Airlines v. Hardison*, 432 U.S. 63 (1977) that reasonable accommodation can indeed include systematic practices which apply to all employees. In discussing a seniority system, this court noted:

> [I]t appears to us that the system itself represented a significant accommodation to the needs, both religious and secular, of *all* of TWA's employees. 432 U.S. at 78 (emphasis added).

The en banc majority opinion in this case suggests that across-the-board accommodation is inferior accommodation (A. 6a). Because this matter is important to employers attempting to deal with all employees in a fair

and even handed manner, Ithaca urges this Court to accept its petition and reaffirm that systematic accommodation meets the reasonable accommodation requirement of Title VII.

C. Religious Discrimination Vel Non Is A Finding Of Fact For The District Court's Initial Determination (Question 3)

While counsel for Ithaca hold the Fourth Circuit in the highest possible esteem, they are nonetheless compelled to respectfully urge that the en banc majority usurped the function of the District Court in this case. This Court held in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985), *reversing* 717 F.2d 149 (4th Cir. 1983) (Hall, J.), that a finding of discrimination under Title VII is a finding of fact subject to the clearly erroneous test of Rule 52(a) of the Federal Rules of Civil Procedure. Ithaca submits that the en banc majority herein did not properly defer to the District Court's finding of nondiscrimination and essentially conducted an improper de novo review of the matter.

It is not apparent from the en banc majority's opinion that it applied the clearly erroneous test and overruled a single finding of fact by the District Court. To the extent that the en banc majority changed the law of the Fourth Circuit by overruling *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977) (rehearing and rehearing en banc denied), the case should have been remanded to the District Court—not decided de novo at the appellate level. See the dissent of Judge Wilkins at A. 8a-9a. This Court has held in Title VII cases that remand by a court of appeals is the appropriate course of action when a district court's findings of fact may have been influenced by its mistaken view of the law. *United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 717 (1983); *accord, Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

Ithaca believes that it is important for this Court to clearly allocate the decision making authority between the district courts and the circuit courts with respect to reasonable accommodation determinations under Title VII. Reasonable accommodation cases involve, for the most part, factual determinations which can best be made by the district courts. *TransWorld Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 n. 14 (1977) ("[W]e prefer the findings of the District Judge who heard the evidence"). It is submitted that a district court should not be reversed with regard to a finding of religious discrimination vel non unless there was clear error and that error was articulated by the circuit court. A clear resolution of this matter would remove uncertainty and lessen the need for appeals in future cases.

II. THE CONSTITUTIONALITY OF TITLE VII'S RELIGIOUS ACCOMMODATION REQUIREMENT WAS SUSTAINED BY THE COURT OF APPEALS. THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT (QUESTION 4)

Ithaca submits that the Title VII reasonable accommodation requirement violates the Establishment Clause of the First Amendment because the requirement cannot pass muster under the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The District Court in *Isaac v. Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980), supports this position. The en banc majority, however, relied upon circuit court decisions which, contrary to *Isaac*, have upheld the constitutionality of the reasonable accommodation requirement. *E.g., Protos v. Volkswagen of America, Inc.*, 797 F.2d 129 (3rd Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986) (Justice White would have granted certiorari). This Court should grant this petition in order to resolve the conflict between the courts.

Should this Petition be granted, Ithaca will ask the Court to hold that the religious accommodation requirement of Title VII is unconstitutional to the extent it is construed to require a preference for persons seeking to avoid work requirements for religious reasons. While the "de minimus expense" and "undue hardship" analysis satisfies the statutory requirements of Title VII, there should also be a constitutional analysis to scrutinize the circumstances for reverse discrimination which would tend to establish religion. *If* the en banc majority opinion has correctly carried out the Title VII analysis in this case, which is disputed, then the Establishment Clause was contravened because Mr. Dean was granted a religious preference to the detriment of others.

The constitutionality of Title VII's religious accommodation requirement was presented in *TransWorld Airlines v. Hardison*, 432 U.S. 63 (1977), but the Court disposed of that case on statutory grounds. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), a Connecticut statute was held unconstitutional because it gave employees an absolute right to refuse employment on their Sabbath. It is clear, therefore, that reasonable accommodation has constitutional limits. Ithaca submits that the en banc majority decision does indeed require preferential treatment for Mr. Dean, thereby placing this case in the same category as *Thornton*.[3]

A definitive decision by the Supreme Court on this important constitutional issue will resolve questions which have plagued this Court and the lower courts since *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *Aff'd by an equally divided Court*, 402 U.S. 689 (1971).

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[3] The Court in *Thornton* faulted the Connecticut statute because it made no exception "when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." 472 U.S. at 709-710. Ithaca submits that the same situation exists in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-2526

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant

versus

ITHACA INDUSTRIES, INC.,
Defendant-Appellee

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte
Robert D. Potter, Chief District Judge—(CA-85-687)

Argued: February 1, 1988 Decided: June 8, 1988

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON, AND WILKINS, Circuit Judges, sitting en banc.

Warren Robert Duplinsky (Charles A. Shanor, General Counsel; Lorraine C. Davis, Associate General Counsel (Acting); Equal Employment Opportunity Commission on brief) for Appellant; Robert Oliver King (Ogletree, Deakins, Nash, Smoak and Stewart on brief) for Appellee.

HALL, Circuit Judge:

Dannel Dean, the charging party in a civil action alleging religious discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, appeals a decision of the district court granting judgment for his former employer, Ithaca Industries. By a majority vote, a panel of the Court affirmed the judgment of the district court. *EEOC v. Ithaca Ind., Inc.*, 829 F.2d 519 (4th Cir. 1987). Thereafter, a majority of the Court voted to reconsider the case en banc. A majority of the en banc Court has now voted to reverse the judgment of the district court for the reasons set forth below.

I.

Dean began working for Ithaca at Gastonia, North Carolina, on July 23, 1979, on the second shift as a turning operator. Ithaca produced cloth for J. C. Penney, Nike, and Ocean Pacific at its Gastonia plant. On April 11, 1983, Dean was transferred to the first shift as a Morrison Machine Operator. From July 18, 1983, to January 16, 1984, he was on extended leave of absence due to a serious brain tumor. Upon his return, he was assigned to work as a dryer helper on the first shift.

Dean has been a member of the Church of God since 1977 and believes that he cannot work on Sunday because it would violate his religious beliefs. Dean made this belief clear to his supervisors and other Ithaca officials at the time of his initial employment and was told that Sunday work was strictly voluntary. During the first four years of his employment, Sunday work was not required.

In January, 1984, the plant's production demands became abnormally high which forced the plant to operate on eight Sundays that year. When Sunday work was necessary, the plant operated on a reduced staffing basis in order to allow as many people as possible to have Sunday off. The normal daily complement of workers on the first shift was approximately 25 people. On Sundays the shift was manned by a skeleton crew of 12 to 15 people.

Dean was asked by his supervisor, Andrew Cain, to work the first two operating Sundays in 1984, January 23 and February 19. He refused, but received no reprimand or criticism of any kind. On March 17, Cain ordered Dean to work the following day, which was a Sunday. Dean informed Cain that he could not work because of his religious beliefs. Dean was not told that his absence would be considered unexcused.

On March 19, Cain gave Dean a written warning identifying his failure to work the preceding day as an unexcused absence and stating that "[a]nother unexcused absence will result in termination." This was the first time Dean was made aware that Cain considered his inability to work on Sundays, because of his religious beliefs, an inappropriate reason for not working.

The next Sunday on which work was required was April 1. On Saturday, March 31, Cain approached Dean and instructed him to work the next day. Dean again informed Cain that he could not work because of his religious beliefs. Cain responded that, if Dean did not report for work, he should not return on Monday because he would be terminated. Dean did not report to work that Sunday; Cain worked in Dean's stead. Cain discharged Dean on April 2.

A civil action was filed by the Equal Employment Opportunity Commission ("EEOC") on December 16, 1985, alleging that Ithaca had violated §§ 701(j) and 703(a) of Title VII of the Civil Rights Act of 1964 by discharging Dean because he refused to work on his Sabbath. A

bench trial was conducted on November 18 and 19, 1986. At the trial, several employees testified that they would have been available to work on March 18 and April 1 in Dean's place if they had been asked. However, Cain did not contact any of those employees to see if they would work for Dean. On December 3, 1986, the district court entered judgment in favor of the company, concluding that Ithaca had made no effort to accommodate Dean but that an absolute refusal to work on Sunday was so unreasonable on its face that no reasonable accommodation was possible. This appeal followed.

II.

On appeal, the EEOC contends that the district court erred in holding that Ithaca had no duty to attempt to accommodate Dean's religious belief that he could not work on his Sabbath. Ithaca argues that the district court properly assessed its duty but that in any event the religious accommodation provisions of Title VII violate the First Amendment by promoting and advancing religion; discriminate against employees who do not adhere to religious tenets which prohibit work on a particular day; and result in excessive government entanglement in religion. We disagree with the district court and find no merit in Ithaca's constitutional argument.

Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 20003-2(a)(1), makes it an unlawful employment practice for an employer to discriminate against an employee on the basis of his or her religion. In 1972, an amendment to Title VI, § 701(j), was enacted with the stated purpose to protect Sabbath observers whose employers fail to adjust work schedules to fit their needs.[1] The Act thus requires that an employer, short of

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[1] Section 701(j) as codified in 42 U.S.C. § 2000e(j), provides that

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demon-

undue hardship, make reasonable accommodations to the religious needs of its employees. It is also clear that the burden is on the employer to offer this accommodation.

The district court's conclusion that unless Dean was willing to compromise his religious belief by agreeing to work Sundays on some occasions, Ithaca had no duty to attempt to accommodate the belief turns the statute on its head. It improperly places the burden on the employee to be reasonable rather than on the employer to attempt accommodation. Section 701(j) clearly anticipates that some employees will absolutely refuse to work on their Sabbath and that this firmly held religious belief requires some offer of accommodation by employers.

The district court found, as a matter of fact, that Ithaca had made no specific effort to accommodate Dean. This absolute lack of effort at accommodation by the employer distinguishes this case from our previous case of *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977), and the Supreme Court's decision in *TWA v. Hardison*, 432 U.S. 63 (1977). Appellee's continued reliance on these decisions is therefore misplaced.

In *Jordan*, a prospective employee demanded that she be guaranteed that she would never have to work on her Sabbath if she were to accept employment. There was evidence presented that the employer made some offers of accommodation to Jordan which she refused.[2] This Court

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strates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance of practice without undue hardship on the conduct of the employer's business.

[2] The employment manager for the bank where Jordan sought employment told her that they would try to accommodate her and they had never had a problem with that before. In fact, the bank was already accommodating one employee. Furthermore, the bank had even suggested employment on a trial basis to ascertain if there would be a problem. However, Jordan rejected these offers of accommodation.

subsequently ruled that any further accommodations would constitute an undue hardship.[3]

The Supreme Court in *Hardison* held that the employer, TWA, could not reasonably accommodate the employee's refusal to work on his Sabbath without undue hardship. TWA, however, made several efforts to accommodate the employee. Job swaps, change of days off, and shift transfers were all attempted before TWA concluded that any further accommodation would create an undue hardship.

It is true that in this case Ithaca did demonstrate an effort to accommodate *all* their employees when Sunday work was assigned.[4] These accommodations, however, were clearly not for reasons of religion, nor were they specifically aimed at addressing Dean's beliefs. In addition, Ithaca made no effort to accommodate Dean by any of the methods suggested by the guidelines in the regulations.[5] 20 C.F.R. 1605.2(a)(1)(i). We therefore con-

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[3] To the narrow extent that *Jordan* can be read to say that an absolute refusal to work on the Sabbath is beyond accommodation, it is expressly overruled.

[4] According to evidence adduced at trial, when selecting persons to work on Sunday, Cain would first ask for volunteers from his shift. If there were not enough volunteers to fill all the needed positions, Cain would instruct various employees from his shift to work. Before directing any employee to work on Sunday, Cain would, in an effort to be fair, consider whether the employees had worked other Sundays and how many hours they had worked the previous week. He would also consider whether an employee was qualified for the position he needed to fill. He did not look to other shifts to fill the positions. At the times when he ordered reluctant employees to work on Sunday, Cain suggested that the employee try to find a qualified substitute. Cain never suggested this option to Dean. Although the company had a bulletin board for notices of import to employees, it did not utilize the board to obtain Sunday volunteers, nor would it permit employees to post their own notices in an attempt to secure replacements.

[5] The regulations set out the following as examples of some means of accommodating religious practices: (a) the use of voluntary

clude that Ithaca did violate the Civil Rights Act by discriminating against Dean.

III.

Ithaca contends that the religious accommodation provisions of Title VII violate the First Amendment of the Constitution. The district court declined to reach this issue since it decided the case on other grounds. Assuming that the question is before us, we find no merit in Ithaca's constitutional challenge. Ithaca concedes that its argument has been rejected by other courts but argues that if this issue reached the Supreme Court, it would find § 701(j) unconstitutional. We disagree. Every court of appeals that has addressed this issue has held that § 701(j) does not violate the First Amendment. *E.g., Protos v. Volkswagen*, 797 F.2d 129 (3rd Cir. 1986), *cert. denied*, 55 U.S.L.W. 3358 (U.S. Nov. 18, 1986); *McDaniel v. Essex International Inc.*, 696 F.2d 34 (6th Cir. 1982). We now join these circuits in holding that § 701(j) passes muster under the Supreme Court's three-prong test for constitutionality. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). We are convinced that: (1) § 701(j) clearly has a secular purpose—the elimination of discrimination on the workplace; (2) it has the primary secular effect of preserving the equal employment opportunities of those employees whose moral scruples conflict with work rules; and (3) there is no excessive government entanglement. For these reasons, we conclude that § 701(j) does not violate the First Amendment.

V.

For the foregoing reasons, we reverse the judgment of the district court and remand for determination of appropriate relief.

REVERSED AND REMANDED.

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substitutes with substantially similar qualifications by publicizing policies, promoting an atmosphere in which substitutions are favorably regarded and providing a central file or bulletin board for matching substitutes; and (b) flexible scheduling by means of floating or optional holidays.

WILKINSON, Circuit Judge, concurring:

I concur in Judge Hall's fine opinion. I agree, for reasons noted in his opinion, that the employer in this case could have done more to accommodate Dean's religious beliefs without undue hardship to itself.

I write only to emphasize that the statutory terms "reasonably accommodate" and "undue hardship" are variable ones. 42 U.S.C. § 2000e(j). The fact that Sunday work was temporary here should not obscure the fact that many enterprises must regularly operate on Sundays and other days of religious observance. Hospitals must serve the sick every day, and airlines must attempt to maintain safe and prompt flight schedules. The dangers police and fire departments were established to combat do not disappear on Sundays or any other day.

The Supreme Court emphasized in *Hardison* that employers are not required to abandon seniority systems or to incur substantial costs in order to satisfy the requirements of § 701(j). 432 U.S. at 83-84. Nor, in my judgment, does that statute require an employer to jeopardize safe and effective service to the public. As Judge Hall notes in footnotes 4 and 5 of his opinion, there were options available to the employer here that did not involve such costs or risks, and for that reason I concur in his opinion.

WILKINS, Circuit Judge, dissenting:

The district court reached its decision relying on a 10-year-old precedent of this court, *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977) (rehearing and rehearing *en banc* denied). The majority holds that "[t]o the narrow extent that *Jordan* can be read to say that an absolute refusal to work on the Sabbath is beyond accommodation, it is expressly overruled." I would affirm on the basis of *Jordan*, but, since the majority now effec-

tively overrules *Jordan*, I would remand to the district court.

I.

In *Jordan*, a prospective employee explained to the company's personnel interviewer that she "would not work on Saturdays [her Sabbath]," 565 F.2d at 74, and she would not accept a job unless she received a "guarantee" that she would not be asked to work on Saturdays. *Id.* at 75. The employer responded that "we would certainly try to accommodate [her] . . . but we couldn't give her a formal binding guarantee." *Id.* The only effort by the employer to accommodate was an offer, summarily rejected by the employee, of work on a "trial basis, to ascertain if actually there was a problem of work on her Sabbath." *Id.* at 76.

The court in Jordan concluded that "Jordan's prerequirement on its face was so unlimited and absolute in scope—*never* to work on Saturday—that it speaks its own unreasonableness and [is] thus beyond accommodation," *id.*, and further noted that acceding to Jordan's demands would obligate the employer to do the same for all employees, constituting an "undue hardship" under *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 n.15 (1977).

II.

As in *Jordan*, employee Dean "just couldn't compromise on the Sunday work question," declaring "I just don't work on Sundays. It's against what I believe in." As found by the district court, these views were purely personal to Dean at the time of his refusal to work, rather than a reflection of adherence to the specific teachings of his church.[1] Although the majority concludes

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[1] At his deposition Dean testified that, as far as he knew, his church did not "take a position one way or the other on Sunday work." When asked if his beliefs "[were] strictly personal," he answered that they were.

"Dean made [his] belief clear to his supervisors and other Ithaca officials at the time of his initial employment," Dean's testimony does not support this.[2]

It is undisputed that during the course of most of Dean's tenure with his employer, Sunday labor was not requested. However, in 1984 increased production de-

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[2] It is uncontested that Dean began working at Ithaca in 1979 and that he was never asked to work on Sunday by Ithaca prior to 1984. At trial Dean was asked when he told his supervisor, Andy Cain; the plant manager, James Hall; and the department manager, Arnold Longmire, of his beliefs regarding Sunday work.

He stated that he told Mr. Cain in 1983:

Q. That's Andy Cain?

A. Yes.

Q. Do you remember when you told him about your religious beliefs?

A. It was soon after I came on first [shift].

Q. 1983?

A. Yes.

He stated that he told Mr. Hall in 1981:

Q. You ever tell Mr. James Hall?

A. Yes.

Q. About your religious beliefs?

A. Yes.

Q. And what did you tell him?

A. I told him, I said, "I just don't work on Sundays. It's against what I believe in."

Q. When did you inform Mr. Hall of your beliefs?

A. It was somewhere around '81, soon after he arrived.

When asked if he told Mr. Longmire of his beliefs Dean stated, "I don't remember if I told him or not."

In his tsetimony Dean named no other Ithaca officials to whom he told his beliefs about Sunday work when initially hired. There is a statement in his complaint to EEOC that he told the personnel manager, John Booth, of his beliefs prior to employment. Neither Dean nor Booth testified regarding this alleged conversation.

mand required operation of the plant on some Sundays. When work on Sunday was necessary, the supervisors initially asked for volunteers. If there were not enough volunteers, employees were directed to work on Sunday. Dean was requested to work on Sunday on four occasions between January 22 and April 1. He refused on each occasion, telling his supervisor on the first occasion that he "had out of town guests coming in," and on the second occasion that he "had other plans." On all four occasions a fellow employee or his supervisor worked in his place.

III.

The majority also states that the district court concluded that Ithaca "made no effort to accommodate Dean." While the district court did state under its "Conclusions of Law" that Ithaca made no offer of accommodation,[3] it did so in reliance on the precedent of *Jordan*

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[3] In its order the district court made the following findings of fact as to the issue of accommodation by the employer:

> (14) If Cain was unable to obtain a sufficient number of volunteers for the specific jobs which needed to be filled on a particular Sunday, he would instruct certain employees to work on Sunday. Before directing any employee to work on Sunday, Cain would consider whether the employee had worked on a previous Sunday, or Sundays, how many hours he had worked during the week, and whether the employee could do the particular job which was required. *This was out of accommodation to all employees including Dean.* (Emphasis added.)
>
> . . . .
>
> The Court, therefore, finds that there was no way for the Defendant to accommodate Dean except to allow him every Sunday off and at the same time require all the other employees to work on Sunday at one time or another, when they were needed.

The language of the district court order upon which the majority concludes that "[t]he district court found, as a matter of fact, that Ithaca had made no specific effort to accommodate Dean," is set forth as follows:

which required nothing further after it was established that Dean absolutely refused to work on Sunday regardless of the circumstances.

A review of the record demonstrates that the employer attempted to accommodate not only Dean in the exercise of his religious beliefs, but other employees in the exercise of their beliefs as well. The very process by which Dean's supervisor, Andy Cain, approached employees about Sunday work reflected his concern for balancing Ithaca's economic needs against the workers' religious practices and beliefs, as well as their need for time off from the job. When work on Sunday was necessary to meet production requirements, he first sought volunteers and, if there were insufficient volunteers, he approached individuals and instructed them to work. Those selected were chosen on a rotating basis to avoid repeated Sunday work by the same employees. Other considerations included the number of hours worked by an employee during the preceding week and particular job skills. All employees on Dean's shift worked on Sunday on at least one occasion in 1984, except Dean.[4]

Under 42 U.S.C.A. § 2000e(j) (West 1981), an employer is only required to reasonably accommodate an employee's, or prospective employee's, religious practices

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(5) If, as in most cases, the employer had offered an accommodation to Dean, the question for the Court would be whether the proposed accommodation was reasonable. The Defendant here had not offered an accommodation to Dean, because Dean absolutely refused to work on any Sunday or at any time on a Sunday.

[4] Cain's testimony detailed the selection process and also established that Dean's absence worked economic hardship on Ithaca. Finally, Cain provided for other employees who offered some middle ground for accommodation to attend religious services.

to the extent it does not work an undue hardship on the conduct of the employer's business.

I would remand to the trier of fact for consideration of the testimony and evidence in light of the majority's pronouncement overriding *Jordan*.

Judge Widener and Judge Chapman have asked to be shown as joining in this separate opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-2526

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant

v.

ITHACA INDUSTRIES, INC.,
Defendant-Appellee

[Filed June 8, 1988]

Appeal from the United States District Court
for the Western District of North Carolina

JUDGMENT

THIS CAUSE came on to be heard on the record and the suggestion for rehearing en banc, and the cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, upon rehearing en banc, that the judgment of the said District Court appeal from, in this cause, be, and the same is hereby reversed. The appeal is remanded to the United States District Court for the Western District of North Carolina at Charlotte for determination of appropriate relief.

/s/ John M. Greacen
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-2526

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

ITHACA INDUSTRIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte
Robert D. Potter, District Judge—(C/A 85-667)

Argued: July 9, 1987 Decided: September 24, 1987

Before HALL and WILKINS, Circuit Judges, and G. ROSS ANDERSON, JR., District Judge for the District of South Carolina, sitting by designation.

Warren Bo Duplinsky, for Appellant. Robert O. King, for Appellee.

ANDERSON, District Judge:

The EEOC initiated this action under Title VII of the Civil Rights Act [1] on behalf of Daniel Dean for alleged wrongful discharge resulting from his refusal to work on his sabbath (Sunday). The district court entered judgment for the defendant employer, Ithaca Industries, Inc. (Ithaca). Finding the decision of the district court not "clearly erroneous," we affirm. *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed.2d 518, 105 S. Ct. 1504 (1985).

Ithaca is a textile manufacturing plant located in Gastonia, North Carolina. There were twelve other plants in the network, all dependent upon the Gastonia plant for their finished raw materials. The Gastonia plant served as the finishing plant for the other twelve plants. If Gastonia did not timely produce fabric for the other plants, one or more would have to close.

Historically, the Gastonia plant did not operate on Sundays, however, in early 1984 product demand became so great it was essential that they resort to limited operations on Sunday. In fact, Dean had been employed at the Gastonia facility since 1979 and had never been asked to work on Sunday until January 22, 1984.

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[1] Title 42 *U.S.C.* § 2000e-2(a) provides:

> It shall be unlawful for an employer—(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because* (emphasis added) of such individual's . . . religion . . . .

Title 42 *U.S.C.* § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably* (emphasis added) accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

During the relevant time period we are concerned with only four Sundays, to wit: January 22, February 19, March 18 and April 1, 1984.

Dean was requested to work on Sunday, January 22, 1984 and on February 18, 1984 but he refused stating he was expecting out-of-town guests and that he had already made other plans. On neither occasion did he base his refusal on religious grounds. He was not disciplined on either occasion for his refusals.

On Friday, March 16, 1984 Dean failed to appear for his shift as scheduled. This absence precipitated a written warning regarding Dean's chronic absenteeism in the form of an Employee Relations Report which provided that:

> Employee has been out 8 days this year. He has been told this must improve if he is to remain at Ithaca.
>
> Employee has poor attitude which has been covered.

Dean refused to sign this report even after a prolonged conference with his supervisor.

It was not until March 18, 1984 that Dean refused Sunday work based on religious reasons. When he reported to work on Monday, March 19, 1984 he received another written warning which read in part:

> Employee has 9 absences and 1 unexcused absence. Another unexcused absence will result in termination.

Again, Dean refused to sign the Employee Relations Report after a full explanation from his supervisor. These facts indicate that his employment career was somewhat less than impressive.

When requested to work on April 1, 1984 he flatly refused reasoning that he was not working for anyone on Sunday because of his religious beliefs. He was discharged on Monday, April 2, 1984.

Ithaca's policy on Sunday work was non-discrimiatory. Shift supervisors first sought volunteers. If a sufficient work force could not be recruited on a volunteer basis, the shift supervisor designated particular employees. In selecting Sunday workers the supervisor took into consideration whether or not an employee had worked on previous Sundays, how many hours had been worked during the week and the qualifications of the employee for the particular job.

Each shift was responsible for obtaining their Sunday workers, hence, they were not recruited from other shifts.

Dean conceded he was not treated any differently from other employees on his shift.

The posture of Dean's refusal to work on Sunday is more aptly reflected in his testimony at trial:

> Q. In other words, you would have to be guaranteed that your job would not require Sunday work?
>
> A. Yes.

Dean also testified he was willing to work with management and his fellow employees on every issue except Sunday work and that he could not compromise on the Sunday work question.

Given this factual scenario we must decide if Ithaca (1) discriminated against Dean because of his religion and (2) failed to reasonably accommodate his religious observation or practice without undue hardship on the conduct of Ithaca's business.

Assuming arguendo that Dean established a *prima facie* case of discharge for religious reasons, the next inquiry is did Ithaca demonstrate any effort to reasonably accommodate his religious observance or practice.

In an effort to accommodate the religious practices of Dean and its other employees, Ithaca personnel super-

visors took the following steps: employ the minimum work force possible to maintain production on Sundays; attempt to fill skeleton work crews first with volunteers; and select additional workers on a rotating basis with additional safety considerations.

After implementing this policy Ithaca faced a Hobson's choice when confronted with Dean's uncompromising and adamant refusal to work on Sunday. Ithaca could either totally capitulate to Dean's demands and require other employees to perform his work or replace Dean with an employee willing to make reciprocal accommodations. This choice would compel Ithaca to openly discriminate against other workers.

Dean's uncompromising attitude and his desire for a guarantee for no Sunday work boxed Ithaca into a corner. Nothing they could do, except unconditionally surrender to his demands, would suffice.

The district court recognized the statutory meaning of "reasonable accommodation" and the corresponding burdens.

> [T]he statute's use of the term "reasonable" suggests: bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employee's business. Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer.

Brener v. Diagnostic Center Hospital, 671 F.2d 141, 145-146 (5th Cir. 1982).

Throughout his testimony, Dean refused to compromise in any way on the Sunday work issue. He never offered to work on Sunday if he would be allowed to attend church services. The district court judge found that "he

just would not work on Sunday, period." (Transcript at p. 14, para. 34). By his own absolutist position, Dean precluded Ithaca from making a reasonable accommodation for his religious practices.

This Court has previously faced the refusal to work on sabbath conflict. In *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977) (Rehearing and Rehearing *en banc* denied), a qualified applicant with a sound work record sought re-employment by the bank. However, as a precondition to her employment, Jordan demanded an unrestricted guarantee that she would never be asked to work between sundown Friday and sundown Saturday, her Sabbath. The bank could not make this guarantee and refused to hire Jordan. This Court reversed the district judge's religious discrimination finding and stated:

> Jordan's pre-requirement on its face was so unlimited and absolute in scope—never to work on Saturay—that it speaks its own unreasonableness and thus beyond accommodation.

Jordan, supra, 565 F.2d at 76.

The circumstances in the instant case provide even more justification for Ithaca's response to the conflict than existed in *Jordan*. First, there is no indication in *Jordan* that the bank attempted to accommodate the applicant by soliciting a pool of stand-by volunteers for potential work on Saturday. Ithaca did in fact make efforts to accommodate Dean's religious practices. Secondly, the conflict in *Jordan* was merely anticipated. However, in the instant case the conflict manifested itself into a very real and immediate impasse. The Gastonia plant provided all of the raw material to Ithaca's finishing plants. The continued operation of several plants depended upon the steady flow of material from the Gastonia plant. Lastly, in *Jordan* the applicant presented a good employment record in her previous posi-

tion with the bank. In sharp contrast, Dean did not possess a sound work record. During the course of his employment with Ithaca, Dean received written and verbal reprimands for his absenteeism and his cooperation with others. The district court judge's findings recognize Ithaca's dissatisfaction with Dean's performance. Therefore, the holding of *Jordan* applies to this case with even greater force.

EEOC argues we should interpret "reasonable accommodation" in accordance with their own guidelines.[2] We decline to adopt such a construction. The Supreme Court recently reaffirmed proper deference to these regulations in *Ansonia Board of Education v. Philbrook*, 107 S. Ct. 367, fn. 6, 372, 93 L.Ed.2d 305 (1986), *citing also General Electric Co. v. Gilbert*, 429 U.S. 125, 141, 97 S. Ct. 401, 410, 50 L.Ed.2d 343 (1976).

> We have, of course, noted that EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law.

EEOC suggests that Ithaca could have compelled other shift employees to work for Dean; they could have required other employees to work a double shift and they could have located workers on a different shift to perform his duties.

We disagree with these suggested alternatives. The statute is not to be construed to require an employer to

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[2] EEOC Guidelines Section 1605.2(c)(1) provides:

> After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to *reasonably* (emphasis added) accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation . . . .

discriminate against some employees in order for others to observe their sabbath. Such a discriminatory construction would do violence to the very problem it was designed to correct.

> As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath. *TransWorld Airlines, Inc. v. Hardison*, 432 U.S. 63, 85, 53 L.Ed.2d 113, 131, 97 S. Ct. 2264.

Ithaca also contends that the "reasonable accommodation" to an employee's religious belief violates the First Amendment. In view of our conclusion we need not consider this issue.

AFFIRMED

HALL, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that Ithaca made adequate efforts to reasonably accommodate Dean's religious practices. For this reason, I respectfully dissent.

The majority takes the position that an employee who refuses to work on his Sabbath is being unreasonable, thereby relieving the employer of any further duty to accommodate his religious belief. In my view, the Civil Rights Act assumes that certain employees will not work on their Sabbath for any reason. Moreover, the Act clearly places the burden on employers to make some effort to reasonably accommodate an individual's religious practice. I can see no indication that Ithaca made any effort at all to accommodate Dean. It is true that Ithaca did demonstrate an effort to accommodate *all* their employees when Sunday work was assigned.[1] These accommodations, however, were clearly not for religious reasons. In addition, Ithaca made no effort to accommodate Dean by any of the methods suggested by the guidelines in the regulations.[2] 20 C.F.R. 1605.2(d)(1)(i).

The majority relies on *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977) to support its holding that there can be no reasonable accommodation for Dean's absolute refusal to work on Sunday. However, in *Jordan*, the employer did make some effort to accommodate the prospective employee and was in fact accommodating another employee who refused to work on

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[1] According to testimony elicited at the trial, supervisors made an effort to be fair to all employees when assigning Sunday work because none of the employees wanted to work on Sundays.

[2] The regulations set out the following as examples of some means of accommodating religious practices: (a) the use of voluntary substitutes with substantially similar qualifications by publicizing polices, promoting an atmosphere in which substitutions are favorably regarded and providing a central file or bulletin board for matching substitutes; and (b) flexible scheduling by means of floating or optional holidays.

her Sabbath. The majority's reliance on *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264 (1977), is similarly misplaced. In *Trans World*, the employer had looked at all the alternatives available to enable it to accommodate the employee and gave the reasons why it rejected them. It thereby satisfied its statutory obligation. In this case, Ithaca made absolutely no effort at accommodation.

In my view, Dean presented a valid religious reason why he could not work on Sunday (which Ithaca acknowledged was for religious reasons), Ithaca then violated the Civil Rights Act by its failure to attempt to reasonably accommodate Dean's religious practices.

For the foregoing reasons, I would reverse the judgment of the district court.

WILKINS, Circuit Judge, concurring:

Our result is compelled by *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977). In cases where reasonable accommodation with an "absolute" demand by an employee may not be reached "without undue hardship," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 (1977), such a demand "speaks its own unreasonableness and [is] thus beyond accommodation." *Jordan*, 565 F.2d at 76.

The dissent contends that *Jordan* is distinguishable because there "the employer did make *some* efforts to accommodate the prospective employee." (Emphasis added.) But, in this case, the record shows more efforts by the employer to accommodate the employee's religious beliefs than those evidenced in *Jordan*. In *Jordan*, a prospective employee explained to the company's personnel interviewer that she "would not work on Saturdays [her Sabbath]," *id.* at 74, and she would not accept a job unless she received a "guarantee" that she would not be asked to work on Saturdays. *Id.* at 75. The employer responded that "we would certainly try to accommodate

. . . but we couldn't give her a formal binding guarantee." *Id.* The only other effort by the employer to accommodate was an apparent offer, rejected by the employee, of work on a "trial basis, to ascertain if actually there was a problem of work on her Sabbath." *Id.* at 76.

Here, the employee (Dean) "just couldn't compromise on the Sunday work question," declaring "I just don't work on Sundays. It's against what I believe in." These views were purely personal to Dean at the time of his refusal to work, rather than a reflection of adherence to the specific teachings of his church.

It is undisputed that during the course of most of Dean's tenure with his employer, Sunday labor was not requested. However, in 1984 increased production demand required operation of the plant six to seven days per week. When work on Sunday was necessary the supervisors initially asked for volunteers. If there were not enough volunteers, employees were detailed to work on Sunday. Dean was requested to work on Sunday on four occasions between January 22 and April 1. He refused on each occasion. On these occasions other employees were detailed to work in his place, and on one occasion his supervisor filled in for him.

The record is clear that the employer attempted within reason and in good faith to accommodate Dean. The dates in issue standing alone provide a reasonable inference that the supervisor requested Sunday work on a rotation basis, asking Dean's assistance only once per month and requiring it of another employee when Dean refused. Only when it became evident that Dean would not compromise in any manner, after other employees had complained of his preferential treatment, after the last of four requests was made, and after Dean again refused to work on Sunday, did termination result. The employer's efforts at accommodation were sufficient when confronted by an absolute and uncompromising position by the employee.

APPENDIX D

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-85-687-P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

ITHACA INDUSTRIES, INC.,
Defendant.

[Filed Dec. 3, 1986]

THIS MATTER came on to be heard and was heard by the undersigned without a jury at Charlotte, North Carolina on the 18th and 19th of November, 1986. The Plaintiff was represented by James S. Bukes, Senior Trial Attorney for the Equal Employment Opportunity Commission, and the Defendant was represented by Robert O. King, Attorney at Law, of the South Carolina Bar.

After hearing the testimony and examining the exhibits, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

(1) This action was brought by the Equal Employment Opportunity Commission ("EEOC"). The

EEOC was established by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* and is the federal agency charged with enforcement of administration of the Civil Rights Act.

(2) The Defendant, Ithaca Industries, Inc. ("Ithaca") is a Delaware Corporation licensed to do business and doing business in the State of North Carolina.

(3) Dannel J. Dean ("Dean") is a resident of Dallas, North Carolina, and was employed by the Defendant at its Gastonia, North Carolina Plant from July 23, 1979 until April 2, 1984.

(4) On April 3, 1984 Dean filed a charge with the EEOC charging the Defendant with failing to accommodate Dean's religious beliefs by discharging him for refusing to work on Sunday, March 18, 1984 and Sunday, April 1, 1984.

(5) At all times pertinent hereto, the Defendant employed in excess of fifteen employees and was an employer within the meaning of Title 42 U.S.C. § 2000e *et seq.*

(6) Jurisdiction over this case is based on Title 42 U.S.C. § 2000e-(f)(3) and Title 28 U.S.C. § 1343. All administrative prerequisites to the filing of this action have been satisfied including the filing of a written charge with the EEOC, investigation by the Commission, and a finding of reasonable cause by the Commission to believe that the Defendant violated Title VII by failing to accommodate Dean's religious beliefs, and the filing of a timely complaint by the EEOC.

(7) Dean went to work at Defendant's plant in the finishing department on July 23, 1979.

(8) The supervisory personnel at Defendant's Gastonia facilities were:

James H. Hall—Vice President and General Manager

Arnold L. Longmire—Bleach and Finishing Manager

Andy Cain—Supervisor of Finishing, First Shift.

(9) Dean's initial employment at the Defendant's facility was on the second shift. In 1982 or 1983 he transferred to the first shift. Toward the end of his employment he was a Morrison Operator and helper on the Dryer Machine.

(10) Dean was out for medical leave from July 18, 1983 to January 16, 1984.

(11) In 1984 Defendant was the finishing plant for all the cloths for Defendant's other twelve plants. The Defendant was producing cloth for J.C. Penney, Nike, and Ocean Pacific among other customers from whom there was an increased demand resulting in the Defendant's Gastonia plant having to operate six or seven days a week in 1984. If the Gastonia plant did not produce sufficient finished cloth, the Defendant's other plants would be affected and one or more would have to shut down.

(12) In order to meet the production required of the Gastonia plant beginning in 1984, overtime work and some Sunday work was necessary.

(13) Not everyone on the daily work crew was asked to work when Sunday work was required because the supervisory personnel wished to allow as many employees off on Sunday as possible. Thus, Cain would attempt to obtain as many volunteers as he could for the job skills needed for the Sunday shift.

(14) If Cain was unable to obtain a sufficient number of volunteers for the specific jobs which needed to be filled on a particular Sunday, he would instruct certain employees to work on Sunday.

Before directing an employee to work on a Sunday, Cain would consider whether the employee had worked on a previous Sunday, or Sundays, how many hours he had worked during the week, and whether the employee could do the particular job which was required. This was out of accommodation to all employees including Dean.

(15) No employee, except Dean, had ever refused to work one or more Sundays when production demands increased in early 1984.

(16) The employees of the Defendant would on occasion "double over"; *i.e.*, work two shifts in a 24 hour period. However, this was not asked of an employee if it could be avoided because of reduced efficiency and safety considerations.

(17) Cain would not go to other shifts seeking Sunday workers because every shift was responsible for obtaining its Sunday workers and other shifts had the same problem obtaining Sunday workers.

(18) Before Dean's leave of absence there had been no problem about Sunday work because the production schedule did not require Sunday work until Dean returned in January of 1984.

(19) The first time Cain asked Dean to work on Sunday was immediately preceding Sunday, January 22, 1984. Dean declined, saying he was expecting out-of-town quests. He was, therefore, not compelled to work and was not disciplined for not working January 22, 1984.

(20) Dean was next asked to work on Sunday, February 19, 1984. Dean refused, saying he had other plans. He was not compelled to work and was not disciplined.

(21) Dean did not work on Friday, March 16, 1984, and was given a written warning for poor attend-

ance. Dean was asked on Saturday, March 17, 1984 to work on Sunday, March 18, 1984. Dean replied that he was not going to work on Sunday for anybody that it was against his religion.

(22) Dean was at all pertinent times a member of the Church of God and believed that he should not work on Sunday because that was a violation of the third commandment.

(23) Dean testified and the Court finds as a fact that Dean would have to have a job that would guarantee that he did not have to work on Sunday—that the job would not require Sunday work, and that he told both Cain and Hall he would not work on Sunday.

(24) Dean testified and the Court finds as a fact that Dean would not compromise on the Sunday work issue, even though he was aware that the other plants of the Defendant depended on the Gastonia plant production, and that all employees who were needed were required to work some Sundays.

(25) Dean did not work on Sunday, March 18, 1984 and an unexcused absence was entered on his record.

(26) On Monday, March 19, 1984 Dean returned to work and was given a third written warning in his career at Defendant by Cain which in pertinent part read:

> Employee has 9 absences and 1 unexcused absence. Another unexcused absence will result in termination."

(27) Cain needed Dean on Sunday April 1, 1984, and asked him on Saturday, March 31, 1984 to work so that they could get out the orders. Dean said: "I'm not working on Sunday for anybody—it's

against my religion." Cain had wanted Dean to work on the dryer.

(28) Dean did not come in on Sunday, April 1, 1984. Having been told on Saturday that if he did not come in on Sunday, not to come back on Monday, April 2, 1984, he was fired. (See Defendant's Exhibit 7.)

(29) Prior to the time the question arose covering Dean's work on Sunday, Dean had received warnings about his poor performance and his attitude (Defendant's Exhibit 2.)

(30) Dean had a number of absences and had received warnings concerning his absence. (Defendant's Exhibits 3, 5, 6).

(31) At the time of Dean's deposition, January 16, 1986, Dean was not aware of any of the Church of God's beliefs concerning Sunday work. His beliefs that a person should not work on Sunday were purely personal. He had not read any literature concerning the Church of God's beliefs concerning Sunday work. (Defendant's Exhibit 10, p. 17, lines 2-19).

(32) When Dean did not come to work on Sunday, April 1, 1984, it was necessary for Cain to assume his duties, thereby taking him away from his primary duty as a supervisor. Absence of an employee would obviously reduce the amount of production.

(33) Dean did not know of any of Defendant's employees who received better treatment than he did with regard to Sunday work.

(34) Dean never asked any other employee to fill in for him on Sunday, nor did he offer the Defendant any substitute. He just would not work on Sun-

day and that was it. Dean never offered to work on Sunday if he would be allowed to attend church services. He just would not work on Sunday, period.

(35) The supervisors had several complaints from other employees that Dean didn't have to work on Sunday so why did they have to work on Sunday.

(36) The Court does not find that Dean's refusal to work on Sunday was strictly because of his religious beliefs, but in any event and for whatever reason religious or otherwise, Dean absolutely refused to work on Sunday.

(37) Whether the policy of the company's finishing department in 1984 was to require three warnings before discharging an employee or whether the policy was to require three unexcused absences before discharging an employee is really not relevant. The Court finds that the Defendant was extremely busy in the early part of 1984 attempting to produce cloth in a very competitive climate. Dean's attitude was that even though he was aware that operation of Defendant's other plants was dependent on the production of the Gastonia plant he was not going to offer any accommodation for the Defendant to choose from. He just was not going to work on Sunday, anytime, anywhere, for anybody, and for any reason.

The Court, therefore, finds that there was no way for the Defendant to accommodate Dean except to allow him every Sunday off and at the same time require all the other employees to work on Sunday at one time or another, when they were needed.

CONCLUSIONS OF LAW

(1) 42 U.S.C. § 2000e-2(a) provides:

> It shall be unlawful for an employer—
>
> (1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because* (emphasis added) of such individual's . . . religion . . . .

(2) Title 42 U.S.C. § 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably* (emphasis added) accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(3) EEOC Guidelines Section 1605.2(c)(1) provides:

> After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to *reasonably* (emphasis added) accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation . . .

It is noted that EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

(4) The EEOC contends that a case of *prima facie* discrimination is established by the employee showing:

> (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) that he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement. Citing *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022, 1026 (CA5 1984) among other cases.

However, establishing a *prima facie* case does not end the inquiry. There is still the factual inquiry whether the employer is intentionally treating some people less favorably than others *because* of their race, color, religion, sex, or national origin. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577. "Where the Defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *U.S. Postal Service Bd. of Govrs. v. Aikers*, 460 U.S. 711, 715.

(5) If, as in most cases, the employer had offered an accommodation to Dean, the question for the Court would be whether the proposed accommodation was reasonable. The Defendant here had not offered an accommodation to Dean, because Dean absolutely refused to work on any Sunday or at any time on a Sunday.

(6) The cases confirm what the statute's [42 U.S.C. 2000e(j)] use of the term "reasonable" suggests: *bilateral* cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the em-

ployer's business. Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer. *Brenner v. Diagnostic Center Hospital*, 671 F.2d 141, 145 (5th Cir. 1982).

(7) Dean and the Plaintiff are asking that the Defendant discriminate against all employees of the Defendant in favor of Dean so that he alone would not be required to work on Sunday.

(8) Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. *Transworld Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1976).

(9) Dean's demands could not "reasonably" be accommodated by Defendant which precludes a determination that the Defendant was unlawfully discriminating against Dean because there was no *reasonable* accommodation to Dean's demands. *Jordan v. NCNB*, 565 F.2d 72 (4th Cir. 1972).

(10) Indeed it would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preferences of some employees, in order to accommodate or prefer the religious need of Dean, and this Court does not believe Title VII requires an employer to go that far. *Transworld, supra*, p. 81.

(11) The Defendant, in its proposed conclusions of law argues that the religious accommodation provisions of Title VII violate the First Amendment of the Constitution. Since the controversy has been de-

cided by this Court on other grounds, the Court will not reach the constitutional question raised by the Defendant and will defer that to another day.

A Judgment dismissing the Plaintiff's action will be filed simultaneously with this Memorandum.

This the 3rd day of December, 1986.

/s/ Robert D. Potter
ROBERT D. POTTER
Chief
United States District Judge

APPENDIX E

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-85-687-P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

ITHACA INDUSTRIES, INC.,
Defendant.

JUDGMENT

THIS ACTION came on for trial before the undersigned without a jury at Charlotte, North Carolina on the 18th and 19th of November, 1986 and the issues having been duly tried and a Memorandum of Decision having been filed simultaneously with this Judgment;

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff take nothing, and that the action be *DISMISSED* on its merits.

This the 3rd day of December, 1986.

/s/ Robert D. Potter
ROBERT D. POTTER
Chief
United States District Judge

Supreme Court, U.S.
FILED
SEP 29 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-197

In the Supreme Court of the United States

OCTOBER TERM, 1988

ITHACA INDUSTRIES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which requires employers to reasonably accomodate the religious beliefs of their employees unless such accommodation would cause undue hardship, by discharging an employee who refused to work on Sunday for religious reasons.

2. Whether Title VII's reasonable accommodation requirement, 42 U.S.C. 2000e(j), violates the Establishment Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) .. 8
Ansonia Bd. of Educ. v. *Philbrook*, No. 85-495 (Nov. 17, 1986) 6
Bowen v. *Roy*, 476 U.S. 693 (1986) 10
Corporation of the Presiding Bishop v. *Amos*, No. 86-179 (June 24, 1987) 8, 10
Estate of Thornton v. *Caldor, Inc.*, 472 U.S. 703 (1985) .. 9, 10
Hardison v. *Trans World Airlines, Inc.*, 527 F.2d 33 (8th Cir. 1975), rev'd, 432 U.S. 63 (1977) 9, 10
Hobbie v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987) 8, 10
Isaac v. *Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980) 9
Jordan v. *North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977) 4
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 4, 9
McDaniel v. *Essex Int'l, Inc.*, 696 F.2d 34 (6th Cir. 1982) 9
Nottelson v. *Smith Steel Workers D.A.L.U.*, 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981) 9
Protos v. *Volkswagen of America, Inc.*, 797 F.2d 129 3d Cir.), cert. denied, 479 U.S. 972 (1986) 9
Sherbert v. *Verner*, 374 U.S. 398 (1963) 10
Tooley v. *Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981) 9
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 5, 6, 7

Cases – Continued: Page

Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 9, 10
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 10

Constitution, statute and regulation:

U.S. Const. Amend. 1:
Establishment Clause 3, 4, 8, 9, 10
Free Exercise Clause 10
Civil Rights Act, of 1964, Tit. VII, 42 U.S.C. 2000e (j) 3, 5, 6, 8, 9
29 C.F.R. 1605.2(d)(1)(i)-(ii) 7

Miscellaneous:

118 Cong. Rec. 705-706 (1972) 5

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-13a) is reported at 849 F.2d 116. The panel opinion of the court of appeals (Pet. App. 15a-25a) is reported at 829 F.2d 519. The opinion of the district court (Pet. App. 26a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on June 8, 1988. The petition for a writ of certiorari was filed on August 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Ithaca Industries, Inc., operates a plant in Gastonia, North Carolina, that produces cloth. Dannel

Dean has been a member of the Church of God since 1977 and commenced employment at the plant in 1979, at which time he informed petitioner that he could not work on Sunday because it would violate his religious beliefs. Petitioner informed Dean that working on Sunday was not required. During 1984, however, production demands compelled petitioner to operate its plant on eight Sundays, albeit with a reduced staff. There were approximately 25 employees, including Dean, in the first shift and petitioner needed 12 to 15 of those employees to work each Sunday. Pet. App. 2a-3a, 27a-28a.

Dean's supervisor, Andrew Cain, attempted to meet the plant's needs by obtaining volunteers from those working in the first shift. In the absence of sufficient volunteers for any particular Sunday, Cain directed an individual employee to work after considering whether the employee had previously worked on Sunday, the number of hours the employee had already worked that week, and the relationship of the employee's skills to the work needed on Sunday. Dean declined requests by Cain to work on the first two Sundays that Sunday work was required, January 23 and February 19, 1984. Dean also refused Cain's request of March 17, 1984, to work the next day, which was a Sunday, and explained to Cain that it would violate his religious beliefs to work on that day. Cain did not inform Dean that his absence would be considered unexecused until the following Monday, when he also notified Dean that "[a]nother unexcused absence will result in termination" (Pet. App. 3a). On the Saturday before the next Sunday on which work was needed, April 1, 1988, Cain again asked Dean to work the next day. When Dean refused on religious grounds, Cain responded that Dean would be fired if he failed to work the next day (Sunday). Dean did not work on Sunday and petitioner discharged him on Monday, April 2, 1988. Pet. App. 3a, 28a-32a.

On April 3, 1984, Dean filed an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner had failed to reasonably accommodate his religious beliefs, as required by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j). The EEOC investigated Dean's charge and found that there was reasonable cause to conclude that petitioner had violated Title VII. Accordingly, on December 16, 1985, the EEOC brought this action in the United States District Court for the Western District of North Carolina, alleging that petitioner had violated Title VII by discharging Dean because he refused to work on Sunday. Pet. App. 3a, 27a.

2. The district court dismissed the complaint (Pet. App. 26a-36a). The court determined that petitioner "had not offered an accommodation to Dean, because Dean absolutely refused to work on any Sunday or at any time on Sunday" (*id.* at 34a). According to the court, petitioner did not thereby violate Title VII, however, because "Dean's demands could not 'reasonably' be accommodated by [petitioner]" (*id.* at 35a). Congress did not intend by "reasonable accommodation," the court explained (*ibid.* (emphasis omitted)), "that an employer must deny the shift and job preferences of some employees, in order to accommodate or prefer the religious need of Dean." Because the district court agreed with petitioner that Title VII had not been violated, the court declined to consider petitioner's alternative contention that Title VII's reasonable accommodation requirement violates the Establishment Clause (*id.* at 35a-36a).

3. The court of appeals initially affirmed (Pet. App. 15a-25a) by a divided vote,[1] but the court subsequently granted rehearing en banc and reversed (*id.* at 1a-13a).

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[1] Judge Hall filed a dissenting opinion (Pet. App. 23a-24a).

The en banc court held that "[t]he district court's conclusion that unless Dean was willing to compromise his religious belief by agreeing to work Sundays on some occasions, [petitioner] had no duty to attempt to accommodate the belief turns the statute on its head. It improperly places the burden on the employee to be reasonable rather than on the employer to attempt accommodation. Section 701(j) clearly anticipates that some employees will absolutely refuse to work on their Sabbath and that this firmly held religious belief requires some offer of accommodation by employers." Pet. App. 5a.

The court also concluded that petitioner had failed to meet its reasonable accommodation obligation (Pet. App. 5a-7a). Although petitioner "did demonstrate an effort to accommodate *all* their employees when Sunday work was assigned," petitioner's accommodations "were clearly not for reasons of religion, nor were they specifically aimed at addressing Dean's beliefs" (*id.* at 6a) (emphasis in original and footnote omitted). Nor had petitioner sought to utilize any of the methods for obtaining other volunteer workers suggested by applicable EEOC guidelines (*ibid.*).

The court likewise rejected petitioner's claim that Title VII's reasonable accommodation obligation violates the Establishment Clause (Pet. App. 7a). Agreeing with every other court of appeals to reach the issue, the court held that the requirement of reasonable accommodation satisfies the three-prong test established by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The court accordingly remanded the case to the district court for a determination of appropriate relief (Pet. App. 7a).

Judge Wilkins dissented (Pet. App. 8a). The dissent stated that it would adhere to the court's prior decision in *Jordan* v. *North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1977), which, according to the dissent, held that an

absolute refusal to work on the Sabbath is beyond reasonable accommodation under Title VII (Pet. App. 8a). The dissent also faulted the majority for remanding the case to the district court for the sole purpose of determining the appropriate relief. Because the district court's factual findings had been influenced by its adherence to *Jordan*, the dissent explained, the case should instead be remanded to allow the district court to reconsider the testimony and the evidence in light of the court of appeals' subsequent overruling of *Jordan* on appeal (*id.* at 13a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Contrary to petitioner's claim (Pet. 7-8), Title VII's reasonable accommodation requirement does apply where, as in this case, an employee refuses to work on his Sabbath for religious reasons. Indeed, as the court of appeals explained (Pet. App. 4a-5a), Congress adopted the reasonable accommodation requirement for the very purpose of "protect[ing] Sabbath observers whose employers fail to adjust work schedules to fit their needs" (*id.* at 4a (footnote omitted); see 118 Cong. Rec. 705-706 (1972) (remarks of Sen. Randolph); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 73-75 (1977)).

Petitioner's related claim (Pet. 8), moreover, that "Title VII does not include a mandated religious preference" misapprehends the purpose and the extent of Title VII's reasonable accommodation requirement. The fundamental premise of the reasonable accommodation obligation is that facially equal treatment, alone, is not necessarily sufficient under Title VII. Hence, an employer, like petitioner

in this case, that discharges an employee who refuses for religious reasons to work on certain days of the week cannot defend the discharge solely on the ground that all employees are subject to the same employment requirements and penalties.

Instead, an employer must satisfy Title VII's reasonable accommodation obligation in one of two ways. The employer may, as in *Ansonia Bd. of Educ.* v. *Philbrook,* No. 85-495 (Nov. 17, 1986), slip op. 7-9, eliminate the conflict between employment requirements and the employee's religious practices in a manner that reasonably preserves the employee's employment opportunities or job status.[2] Or, as in *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63 (1977), the employer may establish that "all conceivable accommodations would result in undue hardship," such as the imposition of significant burdens on other employees (*Ansonia,* slip op. 5-6).

As the court of appeals found, petitioner failed to make either showing. First, while petitioner made some effort to accommodate the interest of all employees, including Dean, in not working on Sunday, petitioner did not provide an accommodation that eliminated the conflict between Dean's employment responsibilities and his religious

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[2] This Court in *Ansonia* concluded that the employer policy in that case, "requiring [the employee] to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one" because "[t]he provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work" (slip op. 9). The Court nonetheless held that further factual inquiry was required in *Ansonia* because "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones" and the record in the case was not sufficiently clear to deny that possibility (*id.* at 9-10 (emphasis in original)).

beliefs. Petitioner's proffered accommodation still required Dean to work in contravention of his religious beliefs and thus ultimately caused his dismissal. Second, petitioner did not alternatively justify its failure to eliminate the conflict by showing that any conceivable reasonable accommodation would cause it "undue hardship" or adversely affect the employment status of other employees. For instance, as described by the court of appeals (Pet. App. 6a-7a & n.5), petitioner never attempted to utilize any of the possible accommodations suggested by EEOC guidelines, including either "the use of voluntary substitutes with substantially similar qualifications by publicizing policies, promoting an atmosphere in which substitutions are favorably regarded * * * ", or "flexible scheduling by means of floating or optional holidays." See 29 C.F.R. 1605.2(d)(1)(i)-(ii). Instead, petitioner declined to look for volunteers outside the first shift of employees, never offered Dean the option of seeking a qualified substitute, and neither used the bulletin board itself to seek Sunday volunteers nor allowed employees to post their own notices on the board in an effort to secure replacements (Pet. App. 6a n.4). Nothing in the record suggests that any of these possible efforts at accommodations would have imposed undue hardship on the employer or would have adversely affected the employment status of other employees.

For this reason, petitioner's repeated reliance (Pet. 7, 8-9) on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison, supra,* is misplaced. The court of appeals' decision does not, contrary to *Hardison,* 432 U.S. at 85, "require an employer to discriminate against some employees in order to enable others to observe their Sabbath." Nor does the court of appeals' judgment in this case rest on a ruling that "across-the-board accommodation is inferior accommodation" (Pet. 8-9). In *Hardison,*

unlike this case, the employer established that all conceivable accommodations would result in undue hardship, including the imposition of undue burdens on the employment status of other employees. Petitioner has made no such showing here.

Finally, petitioner erroneously argues (Pet. 9-10) that the court of appeals "conducted an improper de novo review" of the district court's finding that petitioner had not engaged in discrimination in violation of Title VII. In contrast with the court of appeals' decision in *Anderson* v. *City of Bessemer City,* 470 U.S. 564 (1985), however, the court of appeals did not reject any of the district court's factual findings. The court instead simply rejected the district court's erroneous legal conclusion that an employee's absolute refusal to work on his Sabbath was not subject to the reasonable accommodation obligation.[3]

2. The court of appeals also correctly rejected petitioner's claim that Title VII's reasonable accommodation requirement does not violate the Establishment Clause. " 'This Court has long recognized that the government may * * * accommodate religious practices and that it may do so without violating the Establishment Clause.' " *Corporation of the Presiding Bishop* v. *Amos,* No. 86-179 (June 24, 1987), slip op. 6 (quoting *Hobbie* v. *Unemployment Appeals Comm'n,* No. 85-993 (Feb. 25, 1987), slip op. 8). Title VII's reasonable accommodation requirement is just such a permissible governmental accommodation of religion.

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[3] The court of appeals relied (Pet. App. 4a-5a) on the district court's determination (*id.* at 34a) that "[t]he [petitioner] here had not offered an accommodation to Dean, because Dean absolutely refused to work on any Sunday or at any time on Sunday."

Indeed, as every court of appeals to address the issue has concluded,[4] Title VII's reasonable accommodation requirement easily satisfies this Court's three-prong test for determining whether particular governmental action offends Establishment Clause concerns. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). It has a "secular legislative purpose" and a "principal or primary effect * * * that neither advances nor inhibits religions," and it does "not foster 'an excessive government entanglement with religion' " (*ibid.*, quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 674 (1970)).

Most fundamentally, Title VII is "a statute outlawing employment discrimination based on race, color, religion, sex, or national origin [and] has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society." *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring). In addition, although Title VII may sometimes require that the employer provide an employee with "special" or "preferential" treatment in response to the employee's religious beliefs, such "treatment of religious practitioners does not

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[4] *See Protos* v. *Volkswagen of America, Inc.*, 797 F.2d 129, 137 (3d Cir.), cert. denied, 479 U.S. 972 (1986); *McDaniel* v. *Essex Int'l, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley* v. *Martin Marietta Corp.*, 648 F.2d 1239, 1244-1246 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Nottelson* v. *Smith Steel Workers D.A.L.U.*, 643 F.2d 445, 453-455 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33, 43-44 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 63 (1977). Contrary to petitioner's assertion (Pet. 10), the district court's conclusion in *Isaac* v. *Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980), that Title VII's reasonable accommodation requirement violates the Establishment Clause does not present a "conflict" warranting further review. This Court reviews circuit conflicts and not conflicts between district courts and courts of appeals.

present the dangers of 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' against which the Establishment Clause is principally aimed" (*Hardison,* 432 U.S. at 90-91 n.4 (Marshall, J. dissenting) (quoting *Walz* v. *Tax Comm'n,* 397 U.S. at 668)). See *Bowen* v. *Roy,* 476 U.S. 693, 712 n.19 (1986).[5]

Nor, contrary to petitioner's suggestion (Pet. 11), does this Court's recent decision in *Estate of Thornton* v. *Caldor, Inc., supra,* compel a different result. As this Court recently explained in *Corporation of the Presiding Bishop* v. *Amos,* slip op. 9 n.15 (citation omitted), the Court in *Caldor* struck down the state statute challenged on Establishment Clause grounds because the statute gave "the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." As previously described, Title VII's reasonable accommodation requirement is not similarly infirm because it is limited to those actions that do not result in the imposition of significant burdens on the employer or other employees. See *Estate of Thornton* v. *Caldor, Inc.,* 472 U.S. at 712 (O'Connor, J., concurring) ("Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an antidiscrimination law rather than an endorsement of religion or a particular religious practice.").

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[5] Title VII's requirement of religious accommodation has much in common with the requirement of accommodation implicit in the Free Exercise Clause, which clearly cannot be deemed to violate the Establishment Clause. See, *e.g., Hobbie* v. *Unemployment Appeals Comm'n,* No. 85-993 (Feb. 25, 1987); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Equal Employment Opportunity Commission

SEPTEMBER 1988

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
The EEOC's Concession That The Fourth Circuit Accepted The District Court's Findings Of Fact Compels A Reversal Of The Fourth Circuit's Judgment..	1
CONCLUSION	2

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 22.5 of this Court's rules, the Petitioner, Ithaca Industries, Inc. ("Ithaca"), submits this Reply Brief in response to the brief of the Respondent Equal Employment Opportunity Commission ("EEOC").

The EEOC's Concession That The Fourth Circuit Accepted The District Court's Findings Of Fact Compels A Reversal Of The Fourth Circuit's Judgment

The EEOC states in its brief that "the court of appeals did not reject any of the district court's factual findings" (Res. 8). This is precisely the point which Ithaca stresses.

One of the findings of fact by the district court was as follows:

> The Court, therefore, finds that there was no way for the Defendant to accommodate Dean except to allow him every Sunday off and at the same time *require* all the other employees to work on Sunday at one time or another, when they were needed. (Pet. 32a) (emphasis added).

It is clear from the above quote that the district court found that Ithaca could not reasonably accommodate Dean without infringing on the rights of other employees (*i.e.*, without "requiring" them to work when they wanted to be off). As admitted by the EEOC, this crucial finding of fact has not been overturned. Therefore, the court of appeals was in error when it reversed the district court and ordered a religious preference for Mr. Dean. The granting of this petition for a writ of certiorari will enable this Court to correct an important misinterpretation of Title VII and Supreme Court precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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